APPEAL NO. 93129

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). On January 13, 1993, a contested case hearing was held in (city), Texas, (hearing officer) presiding. The hearing was reconvened, and the record closed, on January 27th. The appellant (hereafter carrier) appeals the hearing officer's determination that the respondent (hereafter claimant) sustained an injury to his back, in addition to abdomen injuries, on (date of injury), in the course and scope of his employment. The claimant basically contends that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that he worked at (employer), which overhauled aircraft. On (date of injury), while pushing hard, trying to close a jet engine cowl, the scaffolding he was standing on rolled, causing the pressure he was exerting to shift. He said he heard a pop in his right side, at the bottom of his rib cage, and that he felt immediate pain there. He said he also felt pain in his lower back, but that it was nothing like the pain in his side. On January 9th his employer sent him to a clinic where he was treated by (Dr. M). He said he does not remember whether he told Dr. M about his back hurting, but that during the period he saw Dr. M (January 9th through January 13th) his back pain had not become severe. Records from Dr. M reflect he treated claimant for a strain of the lower abdomen and that he was much improved by January 13th.

The claimant returned to work on January 13th, but said he called in sick on January 15th because of his back pain. The following day he said he talked to employer's director of operations, (Mr. D), told him about the back pain, and said he intended to go back to Dr. M. About 30 minutes later, he said, Mr. D called him in and fired him for excessive absenteeism. The claimant said the employer, which went out of business in March or April of 1992, had never had enough business to keep claimant and other employees busy all the time, and that he did take time off because of the lack of work.

A signed and notarized statement from Mr. D stated that claimant reported a stomach muscle injury to him, but that claimant never complained to him of any back injury. Dr. M's deposition on written questions states that claimant never complained of pain in his back while he was treating with Dr. M, and that he only mentioned back pain "during TC 24 September '92." Dr. M also stated his opinion that claimant "did not at any time while I was treating him indicate that his back had been injured on (date of injury). In fact, he told me on 1-13-92 that he was '250 percent better.' Therefore, I do not believe he injured his back on (date of injury)."

The claimant testified he did not go back to Dr. M on January 15th because he thought he had to get approval from his employer first. He did not seek medical attention

for the next three months or so because he was out of work and could not afford it. He also was under the impression that, because he had been fired, he was no longer entitled to workers' compensation benefits. On April 2, 1992, he was hired by Sage Signs as a sign painter. The claimant said he and the owner, (Mr. W), had met before and had a mutual friend. He also said he told Mr. W of his previous back injury, and that he took this job because he could sit while working and did not have to lift anything heavy. A signed statement of Mr. W dated October 22, 1992 said that prior to claimant's employment with Sage Signs, he had mentioned his prior back injury.

On May 28th claimant saw (Dr. L). A new patient form the claimant filled out on that date described symptoms of lower back pain and intermittent leg pain and neck pain, which first began "3 weeks ago." Another patient form of the same date also said the claimant had had this problem for three weeks. Claimant stated, however, that he had told Dr. L the pain was intermittent and episodic, and that the latest episode of pain began three weeks before. Under the question, "How Happened," there was a question mark and the statement "6-7 yrs ago sprnd (sic) LB lift. commmcl sewing machine. . . ." The claimant testified that his only prior back injury was about eight years before when he strained his back lifting a commercial sewing machine for his cousin, an injury he said resolved in three days and for which he had not sought medical treatment.

Claimant said he saw Dr. L twice; because he was getting no relief he went to Dr. Wilson, who referred him to (Dr. C), an osteopathic spine specialist. On September 21st Dr. C diagnosed a herniation at L4, and said the claimant would probably have to have surgery. Dr. C's report stated in part that, "[claimant's] chief complaint is severe left hip pain. There is no acute injury, but this patient has been hurting rather severely since May." The claimant stated that he guessed Dr. C "got that reference to May was I showed him [Dr. L's] x-rays of me, and he--I guess he assumed that May pain started when I had the x-ray done. The x-ray is dated May of '92."

The claimant said he was not able for financial reasons to pursue treatment with Dr. C, who suggested he go to an emergency room physician he recommended. Before claimant could keep that appointment, he said, he woke up on September 26th in intense pain, with his left leg "almost paralyzed." He was taken by ambulance to the emergency room, where he was seen by (Dr. P). Dr. P ordered a CT scan which disclosed a massive ruptured disk at L5-S1. Dr. P performed emergency surgery the following day.

Claimant's medical history, as recorded by Dr. P, said he had suffered an on the job injury in January of 1992 while working for employer. Dr. P also wrote in a November 30, 1992 "To Whom It May Concern" letter in part as follows:

[Claimant] related to me in his history that he initially hurt himself in 1992 and was treated subsequently to [sic] that and was able to return to work. He has

> returned to work and tried to maintain occupational job [sic] since then. There is no question in my mind that the initial tear in the annulus occurred during that incident and a progressive herniation occurred. . . Despite the patient trying to receive care, he was not referred to a neurosurgeon. . .No significant studies were obtained that I am aware of that would establish he did not have an annular tear. The only study that would have been pertinent to this point after the incident would have been a discogram at that level to demonstrate non-tear after that initial incident. If this had been performed, one might make a case that his injury was not related to his accident in January. However, to my knowledge, this had not occurred. Therefore, I think that the proof clearly lies that this incident is related to his January accident.

Dr. P further stated that in the natural history of lumbar disc disease, tears and radial tears in the annulus may create significant back and leg pain and yet not be seen on any initial studies, only to progress over time due to simple weight bearing. He said these tears can end up with significant herniations due to lack of repair.

In its request for review, the carrier contends that the hearing officer's determination that the claimant suffered a compensable back injury is against the great weight and preponderance of the evidence. It points out that it is not contesting that claimant suffered relatively minor abdominal injuries following an incident at work on (date of injury). Carrier calls our attention to evidence such as claimant's initial failure to report a back injury to Dr. M; his statements on the May 28th patient history that his back symptoms began three weeks before; his failure to seek medical treatment from January to May; Dr. C's medical notes that there was no acute injury; and Mr. D's written statement that claimant never informed him of a back injury, contrary to claimant's testimony. Carrier also says the fact that Dr. P first saw claimant 9 1/2 months after the date of the accident renders his impressions mere suppositions, and says Dr. P speaks only in terms of possibility, not reasonable medical probability.

This case presents conflicting facts which are clearly within the purview of the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). Despite some inconsistencies between claimant's testimony and his apparent actions, the hearing officer could believe the claimant's statements about the history and progression of his injury. A claimant's testimony, if believed, can support a finding of injury in the course and scope of employment. Highlands Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). To the extent claimant's testimony conflicts with other evidence, the hearing officer is entitled to resolve conflicts in testimony and in the evidence. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Further, the hearing officer also made it clear he found the statements of Dr. P more credible and compelling than other medical evidence in the

record. The hearing officer's role as fact finder extends equally to assigning the appropriate weight to medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston [14th Dist.] 1984, no writ). We observe that this case does not appear to be one that requires expert medical testimony to establish by a reasonable probability that the condition is causally connected to the employment, Insurance Co. of North America v. Meyers, 411 S.W.2d 710 (Tex. 1966), but rather one where the issue of injury may be established by the testimony of the claimant and other lay witnesses. Houston Independent School District v. Harrison, 774 S.W.2d 298 (Tex. Civ. App.-Houston [1st Dist.] 1987, no writ). However, even presupposing expert medical testimony were required, reasonable medical probability can be based upon the evidence as a whole. *See generally* Parker v. Employers' Mutual Liability Insurance Co. of Wisconsin, 440 S.W.2d 43 (Tex. 1969).

Upon review of the evidence in the record, we find that the hearing officer's determination that the claimant suffered a compensable back injury on (date of injury) is not against the great weight and preponderance of the evidence. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986). The decision thus will not be set aside, even though different inferences and conclusions could be drawn upon review of the same evidence. Garza v. Commercial Insurance of Newark, N.J., 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ).

The decision and order of the hearing officer are accordingly affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge